No. 85-1347

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The judgment and order of the Supreme Court of Pennsylvania is, for purposes of 28 U.S.C. §1257(3), a final judgment, conferring jurisdiction on this Court to review the claim of constitutional error presented by your petitioner.

The Supreme Court of Pennsylvania has effectively invalidated the confidentiality provisions of the state Child Protective Services Law,[1] relying exclusively on its

[1] Act 1975, November 26, P.L. 438, No. 124, §15; 11 P.S. §2215 (Purdon).

interpretation of the scope of the privileges afforded a state criminal defendant by the Confrontation and Compulsory Process Clauses of the Sixth Amendment. *Commonwealth v. Ritchie*, _____ Pa. _____, 502 A.2d 148 (1985); (Pet. for Cert. App. A). In vacating respondent's judgment of sentence, the Court concluded that the trial court's refusal to grant respondent pretrial access to presumptively confidential child protective services files concerning the child-victim and her family impermissibly fettered respondent's ability to defend himself.

> When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it. Otherwise, the Sixth Amendment can be diluted to mean that one may face his accusers or the substance of the accusation, except when one is shielded by legislative enactment.

Id., 502 A.2d at 153; (Pet. for Cert. 11a).

The Supreme Court of Pennsylvania ordered an evidentiary hearing. The trial court has been directed to permit defense counsel to review, without restriction, the entire child protective service file for the purpose of arguing "to the trial court what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence." *Id.*, 502 A.2d at 153-54; (Pet. for Cert. 12a-13a). The Commonwealth may then attempt to establish, if indeed arguably material and relevant matter is disclosed, that the asserted error was constitutionally harmless. *Id.*, 502 A.2d at 154; (Pet. for Cert. 13a). "Unless the trial court is convinced that any error was necessarily harmless, it shall vacate the judgment of sentence and grant [respondent] a new trial." *Ibid.*

A. The Sixth Amendment issue has been finally determined by the highest court of Pennsylvania; there is sufficient justification for immediate review by this Court of the substantial federal question presented.

Respondent does not dispute that the highest court of Pennsylvania has finally determined the federal constitutional issue present in this case, and, of course, the issue is not susceptible of further review in the courts of the Commonwealth. Respondent argues, nevertheless, that the decision is not a final judgment—as that term is understood in Title 28 U.S.C. §1257—because there are further state proceedings to come. Hence, the judgment below is interlocutory (Brief for Respondent 6).

Respondent acknowledges, however, that this Court has "amplified" its orthodox definition of finality[2] over the past 100 years and, in certain cases, has exercised its jurisdiction even where further proceedings in the lower state courts are contemplated. *Id.* at 8. This Court has explained that in certain categories of such cases review has been undertaken despite the apparent jurisdictional barrier.

> In most, if not all, of these cases . . . additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice[.] . . .'

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-78 (1975) (footnote omitted), *quoting Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). However, respondent contends that the present case fits within none of the four exceptions discussed in *Cox Broadcasting Corp.*, 420

[2] Citing *Mower v. Fletcher*, 114 U.S. 127 (1885).

U.S. at 479-483. Specifically, he argues that this Court is without authority to review the judgment below before the evidentiary hearing has concluded because, he speculates, the trial court's harmless error determination could raise additional federal issues or render the issue moot. Respondent reasons that the salutary policies served by avoiding piecemeal litigation would be undermined by this Court's premature assumption of jurisdiction (Brief for Respondent 7-8). In view of the nature of the state proceeding ordered by the Supreme Court of Pennsylvania, and considering that the federal constitutional issue, however decided, will necessarily control the disposition of the evidentiary hearing, respondent's argument, if accepted, would insure judicial inefficiency and piecemeal litigation.

B. Postponement of review would serve none of the policy considerations militating against interlocutory appeals; the very nature of the confidentiality claim demands pre-hearing review to avoid irreparable injury.

The Commonwealth submits that the present controversy is precisely the kind of case in which finality ought to be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The unique facts of this case provide, in the Commonwealth's view, sufficient justification for immediate review. 1) The scope and application of the Confrontation and Compulsory Process Clauses have been authoritatively construed by the Supreme Court of Pennsylvania, incorrectly in the Commonwealth's view. 2) The Sixth Amendment issues, had they been decided the other way, would have been determinative of the only aspect of the decision below which has been contested by the Commonwealth. 3) The mere convening of the state evidentiary hearing, under

the conditions imposed by the state Supreme Court, requires *ab initio* complete disclosure to respondent's counsel of the contents of the confidential file, an irretrievable loss in terms of the interests asserted by the Commonwealth. 4) There is literally nothing left to be decided, and interlocutory review would permit this Court to correct what the Commonwealth believes to be a highly prejudicial legal error. The very nature of the confidentiality claim, as Pennsylvania and *amici* have argued in briefs on the merits, demands immediate protection. *See*, Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L.Rev. 1004, 1007-08 (1978); *Cf., Abney v. United States*, 431 U.S. 651, 662 (1977), (double jeopardy protection would be lost if petitioner's claim were not reviewable before subsequent exposure occurs); *Wardius v. Oregon*, 412 U.S. 470, 478 (1973), (even if petitioner prevailed state would still have benefit of non-reciprocal rights, the very harm which petitioner wishes to avoid by challenging the rule).

Respondent is disposed to concede that under *Cox Broadcasting Corp.*, the issue before this Court would be appropriate for interlocutory review were a new trial to be awarded after the evidentiary hearing (Brief for Respondent 9, 11, 13). Nonetheless, he urges that the Commonwealth must first capitulate on the very issue before the Court by opening the child protective service files for counsel's unrestricted review—an intrusion he characterizes blandly as "minor" (Brief for Respondent 12). Further, he demands that the Commonwealth run the highly probable risk that this controversy will be rendered academic should the trial court determine that necessity for a new trial has not been established. The Commonwealth can conceive of no concern which would be served by the respondent's insistence on such formalism.

C. Postponement of review because of the interlocutory nature of the judgment below will ultimately moot the question presented or render later review impossible.

Notions of federalism and comity do not support respondent's theory of finality because the federal constitutional issue has been fully litigated in an orderly fashion by the state trial court, an intermediate appellate court, and the Supreme Court of Pennsylvania. There are no adequate and independent state grounds for decision. The trial itself has not been interrupted. The record in this case is fully developed legally and factually, providing an ample basis for decision. Crucially, postponement of review until after the evidentiary hearing will inevitably result either in the mooting of a novel question that this Court has determined to be substantial or in an order for retrial, the outcome of which assuredly will render later review impossible. *Cf., New York v. Quarles*, _____ U.S. _____, 104 S.Ct. 2626 (1984); *South Dakota v. Neville*, 459 U.S. _____, 103 S.Ct. 916 (1983); *California v. Stewart*, 384 U.S. 436 (1966).

Respondent's expectation that the Commonwealth must traverse the perilous minefield of mootness to qualify its claim as final utterly ignores, it seems, the fact that *Quarles*, *Neville*, and *Stewart* reflect the disinclination of this Court to subordinate its discretion to that particular uncertainty. *See also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 481, (if petitioner ultimately prevails on the merits the federal issues will be mooted; if petitioner were to lose on the merits, governing state law would not permit the presentation of the federal claim for review). That disinclination applies, the Commonwealth submits, with special urgency where, as here, the Sixth

Amendment issue "is unsettled . . ., is likely to control the disposition of the [evidentiary hearing] . . ., and . . . immediate disposition of the controversy would save unnecessary proceedings and delay in the trial court." Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality,"* 19 Stanford L.Rev. 907, 939 (1967).

Respondent's belief that review must be postponed until after the trial court's harmless error determination, in addition to being oblivious to the core of the present controversy, fails to comprehend the possibility that the harmless error inquiry might be made unnecessary by this Court's adjudication of the constitutional issue. If, for example, this Court were persuaded by the Commonwealth's argument that respondent's preliminary demonstration of constitutional materiality was so deficient as to amount to no offer at all, the trial court will be free, it is supposed, to ignore the mandate of the Supreme Court of Pennsylvania and deny retrial in reliance on this Court's authoritative interpretation of the compulsory process issue. *See, United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). The trial court, additionally, might be enlightened concerning the standard of materiality as it relates to the harmless error analysis. *See, e.g., United States v. Bagley*, _____ U.S. _____, 105 S.Ct. 3375 (1985). Respondent's insistence that the parties proceed to the evidentiary hearing without the benefit of review of this claim will hinder rather than help the trial court's consideration of a potentially complimentary federal issue, serving no apparent interest of judicial efficiency or economy.

Finally, the Commonwealth is moved to comment on respondent's assertion that the Commonwealth must risk contempt by refusing to surrender the child protective service files in order to demonstrate its "seriousness" in this litigation (Brief for Respondent 15). The insinuation, in addition to being offensive, ignores two crucial points. 1) The Commonwealth, through the Office of the District Attorney, has never been custodian of the records. 2) The Commonwealth is not, as was the litigant in *Ryan v. United States*, 402 U.S. 530 (1971), resisting the production of records *per se*. The Commonwealth agrees that, if a preliminary demonstration of materiality and relevance had been advanced, certain material in the records could well be discoverable. The Commonwealth merely quarrels over who shall be custodian and who shall be the judge of materiality and relevancy.

The Commonwealth recognizes the dual responsibilities it has undertaken in the present case, and it relies on the integrity and persuasiveness of its legal argument—not on polemical observations regarding the adversarial positions of parties to the criminal justice process—to establish that the roles are not incompatible.

Conclusion

The Court is urged to reject respondent's contention that the question presented is not final within the meaning of 28 U.S.C. §1257. For the reasons previously stated in Pennsylvania's Brief on the Merits, the judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

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